Supreme Court of the United States

OCTOBER TERM, 1945

No. 1161

SAFEWAY STORES, INCORPORATED, *Petitioner*,

v.

PAUL A. PORTER, Price Administrator.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Safeway Stores, Incorporated, respectfully petitions for a writ of certiorari to the United States Emergency Court of Appeals to review a judgment (Rec. 81) of said Court entered on March 29, 1946.

The opinion (R. 78) of the Emergency Court of Appeals is not yet reported.

A

STATEMENT OF MATTER INVOLVED

This case is based on a protest filed by petitioner against Amendment 32 (9 F. R. 12590) to Maximum Price Regulation 422 (8 F. R. 9395) issued by the Price Administrator. MPR 422 established ceiling prices for certain foods sold at retail in Group 3 and Group 4 stores.

Petitioner is a corporation organized and existing under the laws of the State of Maryland with its principal office located in Oakland, California. It operates, as a single corporate entity, more than 2,300 retail food stores in 23 states of the United States and in the District of Columbia. It is a chain store organization within the meaning of the Price Administrator's regulations. Its retail stores are classified in Group 3 or Group 4 and therefore must depend upon MPR 422 for their entire retail mark-ups.[1] (R. 62.)

Petitioner makes substantial purchases of fresh fruits and vegetables in carlot and trucklot quantities from growers, country shippers, intermediate sellers, and/or grower-packers. It then performs functions which are ordinarily performed by a country shipper, a broker or shipper's sales agent, a commission merchant, a carlot distributor, a carlot receiver, or first jobber, and a secondary jobber or service wholesaler, for which functions petitioner is granted (with minor exceptions) a single, over-all allowance of only 1½% by Amendment 32 to MPR 422. Most, if not all, of these functions must be performed before the merchandise is received by the retail store. A specific allowance is provided for the performance of each function by all persons performing such except petitioner and other direct-buying retailers.[2] (R. 62-63.)

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[1] While the majority of petitioner's more than 2,300 stores are classified in Group 3, petitioner charges the lower Group 4 prices in all of its stores in the same trading area, irrespective of the sales volume of a particular store. When OPA issued its retail pricing regulations, petitioner was confronted with the problem of abandoning its one-price policy in order to take advantage of the higher Group 3 store prices or of adhering to that policy in the interest of maintaining the good will of its customers. It adhered to the policy.

[2] The functions performed by others and for which specific allowances are granted are as follows:

(1) *Grower.* The grower is the person who actually produces the merchandise. (He may also act as a country shipper.)

Petitioner is in active competition, in its various trading areas, with all persons who perform these functions and who receive therefor substantial and specific allowances. However, until the issuance of Amendment 32 no allowance (with minor exceptions) was provided for the performance of these functions by petitioner and others similarly situated. (R. 63.)

Between July 3 and September 2, 1943, petitioner filed a series of protests to MPR 271, MPR 390, MPR 421, MPR

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(2) *Country Shipper.* The country shipper is the person who prepares the commodities for shipment. This generally involves sorting, grading, sizing, trimming, packaging, etc.

(3) *Broker or Shipper's Sales Agent.* The broker, or shipper's sales agent, means a person who, for a fee, sells merchandise on behalf of his principal without packing or otherwise handling any part thereof. In other words, he normally does not have physical possession of the goods themselves. Therefore, he does not usually have charge of receiving or loading them, but merely maintains contact between the seller (his principal) and the buyer.

(4) *Carlot Distributor.* A carlot distributor is any person, other than a country shipper, who purchases in carlot or trucklot quantities and resells without breaking the original carlot or trucklot unit. The sales may be made at terminal markets or other wholesale receiving points. (See MPR 271, Section 10.)

(5) *Carlot Receiver* (or First Jobber). A carlot receiver, frequently called a first jobber, is any person who buys for profit in unbroken carlot or trucklot quantities for the purpose of reselling in lesser quantities to persons other than the ultimate consumer. (See MPR 426, Appx. H.)

(6) *Secondary Jobber* (or Service Wholesaler). For all practical purposes, a secondary jobber, or a service wholesaler, is a person other than a retailer who for profit purchases goods in carlot or trucklot quantities, or less, and resells them in less than carlot or trucklot to any other person. The only substantial difference is that a service wholesaler is permitted to take an additional allowance when he resells in quantities of less than one-half a container. (See MPR 426, Appx. H.)

(7) *Retailer.* A retailer is a person who sells to the ultimate consumer and who, under the regulations, is divided into four groups based upon volume of sales and type of ownership. Petitioner's stores fall in Group 3 and Group 4 but because of Petitioner's historic policy all of its merchandise is sold at Group 4 prices in areas where it operates both Group 3 and Group 4 stores.

422, MPR 426, and General Order 51, Amendment 2. All six protests were consolidated and denied. Petitioner then filed complaints with the Emergency Court of Appeals.

While the complaints were pending in that court, the Administrator, on October 16, 1944, issued Amendment 32 to MPR 422 which permitted retailers who purchase fresh fruits and vegetables in carlot or trucklot quantities from growers, country shippers, primary sellers, or growers-packers to add 1½% to the delivered cost of such items in computing the net cost base to which the maximum markups of MPR 422 are applied.[3] The amendment was issued in purported pursuance of Section 2 of the Emergency Price Control Act, 56 Stat. 23, 50 U. S. C. Appx. § 901.

In his Statement of Considerations accompanying Amendment 32 the Administrator stated (R. 45):

> ". . . By this action sellers who perform unusual functions are placed in the same position with respect to ceiling prices as retailers who obtain their supplies at a later stage in the distribution process and whose

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[3] Amendment No. 32 (9 F. R. 12590) added the following paragraph to Section 20 of MPR 422:

> "(p) *Fresh fruits or vegetables bought in carlot or trucklot quantities.* If you purchase any item of fresh fruits or vegetables listed in Table B, in 'carlot' or 'trucklot' quantities, from a 'grower', 'country shipper', 'primary seller' or 'grower-packer' (as those terms are defined in the applicable maximum price regulation covering the sale of the item except at retail), figure your ceiling price for that item in the following way: Start with the amount paid for the quantity of the item delivered, less all discounts except the discount for prompt payment. Add to that figure all transportation charges you paid to your usual receiving point, which may include costs for icing, refrigeration, and ventilation, but not costs for local trucking or local unloading. (If you perform, in connection with any item any of the functions described in paragraphs (f), (g) or (h) of this section, start with the figure computed for that item under the applicable paragraph.) Increase that figure by 1½ percent. Reduce the resulting figure to the 'net cost' per 'selling unit' and apply the mark-ups for your group of retailer as set forth in section 8."

'net cost' already reflect complete acquisition expense."[4]

The Administrator further observed (R. 47):

> "The accompanying action is *tentative* in nature, and is designed as a *corrective measure until complete economic data can be obtained.* Upon the basis of a *preliminary* study, it appears that an increase of 1½ percent . . . is a proper allowance. The Price Administrator *proposes a more detailed survey* of the nature and costs of the prewarehousing function for which a greater or lesser allowance, as warranted, will be made." (Emphases supplied.)

The Administrator did *not* find that the amendment was "generally fair and equitable" and would "effectuate the purposes of the Emergency Price Control Act", but he did note that the Economic Stabilization Director had approved the issuance of the amendment as being justified in order to correct a "gross inequity." (R. 47.)

The fact that this 1½% allowance had been tentatively provided, with a proposal for a "more detailed survey" was submitted to the Emergency Court by the Administrator in a supplemental memorandum. This occurred after

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[4] Petitioner's protest was based, inter alia, upon the fact that Amendment 32 did not place petitioner "in the same position with respect to ceiling prices as retailers who obtain their supplies at a later stage in the distribution process." Ceiling prices under MPR 422 are based upon cost of acquisition plus a percentage markup thereon. As an illustration of the inequity imposed upon petitioner by the failure of the Administrator to place it in the same position as its Group 4 competitors who buy from a wholesaler, the following is typical: On carrots grown in California and sold in New York the cost. if bought from a wholesaler with the intervening functional allowances included, would be $5.673 per crate as against the cost allowed to petitioner, which performs all of the same intervening functions, of $4.85 per crate under Amendment 32. Ceiling prices then are fixed by adding 40% of the cost, in either case, thus giving petitioner's Group 4 competitors a much higher price (R. 7).

argument but prior to the decision of the court. The question of the actual amount which was allowed or which should be allowed was not before the court and attention was called to the fact that petitioner did not admit that the 1½% allowance was equitable. (R. 64.) In other words, the action of the Administrator in making available this allowance after the argument made moot the issue regarding the virtual absence of pre-retail allowances for direct-buying retailers, such as petitioner, and left for future determination the question as to whether the 1½% thus belatedly provided was arbitrary, discriminatory, and/or inequitable.

Petitioner's complaints were dismissed on November 29, 1944. In its opinion, the court mentioned Amendment 32 but did not discuss its effect on petitioner's objections. *Safeway Stores v. Bowles,* 145 F. (2d) 836.

On July 24, 1945, after it had become obvious that the Administrator did not intend to make the "more detailed survey" promised in the Statement of Considerations, petitioner filed a protest to Amendment 32. (R. 1.) This protest was denied on November 7, 1945. (R. 15.)

Petitioner then filed a complaint with the Emergency Court of Appeals. (R. 62.) This complaint was dismissed on March 29, 1946. (R. 81.)

B

JURISDICTION

The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act, 50 U. S. C. App. § 924(d), 56 Stat. 31. The complaint was dismissed by the Emergency Court on March 29, 1946. (R. 81.)

C

QUESTIONS PRESENTED

The primary questions presented are—

(1) Whether the Emergency Court of Appeals may, by resorting to the rule of *res judicata,* refuse to review the propriety of a new amendment to a Maximum Price Regulation, which amendment has necessarily never before been the subject of a protest as provided by the Price Control Act.

(2) Whether the refusal of the Emergency Court to consider petitioner's contentions in opposition to the statutory propriety of the new amendment (No. 32) to Maximum Price Regulation 422 deprives petitioner of the right of review and offends against the due process clause of the Fifth Amendment to the Constitution of the United States.

(3) Whether there must be a substantial basis for any action by the Administrator.

(4) Whether the Emergency Court may, prejudicially, impose a requirement upon petitioner while not imposing it upon others.

REASONS FOR THE ALLOWANCE OF THE WRIT

1. *The Emergency Court was arbitrary and capricious in refusing to consider petitioner's objections to Amendment 32 to MPR 422, and its ruling that these objections were res judicata is in conflict with applicable decisions of this Court.* The precise question raised by its issuance was not and could not have been presented to the lower court until after the Administrator denied a protest against the amendment. The ruling of the lower court that petitioner's objections to the amendment are *res judicata* is in conflict with the decisions of this Court in *Russell v. Place,* 94 U. S.

606, 24 L. ed. 214, and subsequent cases establishing the standards to be used in determining whether a question is *res judicata*. Therefore, the action of the Emergency Court should be reviewed.

2. *The mere assumption by the Emergency Court, without any substantial basis, that Amendment 32 is a valid price regulation is contrary to applicable decisions of this Court, and its disregard for petitioner's evidence that the allowance provided was grossly inequitable and discriminatory makes a mockery of petitioner's right of appeal.* There was no substantial basis for the Administrator's action as required by this Court in *Yakus v. United States*, 321 U. S. 414, 88 L. ed. 834. The Administrator did not even find that the amendment was generally fair and equitable and would effectuate the purposes of the Price Control Act. He merely found that the allowance provided was tentative, based upon a preliminary study, and designed as a corrective measure until complete data could be obtained, and he proposed to make a more detailed survey. This he never did. Petitioner offered evidence to show that the allowance was grossly inequitable and discriminatory, but the lower court refused to accept it. Such action, especially in the absence of any showing of a substantial basis therefor by the Administrator, makes any judicial review of the Administrator's position only an empty form. The Court should review this decision in order to safeguard the right of review granted petitioner by the Act, and also the right of due process guaranteed by the Fifth Amendment to the Constitution.

3. *The decision of the Emergency Court of Appeals in the present case is in conflict with its decision in Booth Fisheries Corporation v. Bowles, 153 F. (2d) 449.* Although similar questions were presented in these two cases, the Emergency Court reached conflicting results in deciding them. This Court should grant certiorari in the present

case and resolve the conflict on this question in order to secure a uniform and impartial administration of the Act.

Wherefore, petitioner prays that a writ of certiorari be issued to review the judgment of the United States Emergency Court of Appeals in the above entitled cause, that said judgment be reversed, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and proper.

Respectfully submitted,

ELISHA HANSON,
ELIOT C. LOVETT,
Counsel for Petitioner.

April 27, 1946.